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From: Steve Leimberg's Estate Planning Newsletter
Subject: Lester Law & George Karibjanian: Top 10 Things You Should Know About the Final Portability Regulations

"As an homage to David Letterman, this commentary will detail the 'Top 10' things that you ought to know about the Final Regulations! Not every issue addressed in the Final Regulations is discussed in our commentary, for if we did that, this newsletter would be your new 'go-to' insomnia literature and we would be depriving you of the joy of reading that new portability best seller 'TD 9725' (well it's actually free, but you get the point). Instead, our goal is to focus on the highlights that we think may be most relevant to estate planning practitioners... like you!"

We close the week with **Lester Law** and **George Karibjanian**'s analysis of the final portability regulations.

Lester B. Law is a director at **Abbot Downing**.[1] He is a Board Certified Wills, Trusts and Estates lawyer by the Florida Bar and an executive committee member of the Real Property, Probate and Trust Law section of the Florida Bar. He is a co-vice chair (with **Richard Franklin**) of the Income and Transfer Tax Planning Group of the ABA-RPTE Section. Lester has lectured and written extensively on portability, including prior articles for **LISI**, BNA-Bloomberg, the Florida Bar Journal, other publications and conferences, and presented on the same topic at the 48th Heckerling Institute. Lester received his BBA (honors) from Florida International University, his MST from the University of Miami, his JD from The University of North Carolina at Chapel Hill and his LL.M. in Taxation from The University of Florida (graduating at the top of his class).

George D. Karibjanian is an attorney in the **Personal Planning Department of Proskauer Rose LLP** and practices in Proskauer's Boca Raton office. George is a Fellow in the American College of Trust and Estate Counsel and is Board Certified by the Florida Bar in Wills, Trusts and Estates. He earned his B.B.A. in Accounting from the University of Notre Dame, his J.D. from Villanova University and his LL.M. in Taxation from the University of Florida. George has written and lectured extensively on a variety of estate

planning topics and is a frequent contributor to **LISI**.

The authors are very thankful to **Richard S. Franklin** of **McArthur Franklin PLLC** in Washington, DC, for his invaluable input and thoughts in his review of their commentary.

Here is their commentary:

EXECUTIVE SUMMARY:

Often times, there's a story behind the story. Think of Wicked - The Untold Story of the Witches of Oz[2] where we get a glimpse of Elphaba, the "not-so-wicked" Witch of the West. Well, this too is the case with the not-so-oft-read temporary portability regulations (the "Temporary Regulations") which have now been finalized (the "Final Regulations") - there is a "story behind the story."

Our commentary continues on after **Keith Schiller**'s recent newsletter, Estate Planning At The Movies®: Jeremiah Johnson Marks the Final Portability Regulations.[3] Keith does a wonderful job of summarizing the changes made to the Final Regulations and provides insight on the continued planning and tax preparation issues. Our goal is to tell some of the stories behind the stories … as you "defy gravity" by wandering down the yellow-brick regulatory road.

Given our historical intimate (probably not the best word to use … but it demonstrates our affection for the topic) relationship with the Temporary Regulations, we thought that we would bring a different perspective to the Final Regulations and what they may mean to the estate planners and administrators. Having assisted in the drafting of portability comments to Treasury on behalf of the American Bar Association's Real Property, Trust and Probate Law section ("RPTE," and such comments shall be referred to as the "RPTE Comments"), both before and after the Temporary Regulations were issued (specifically, formal comments on the Temporary Regulations were submitted to Treasury on October 5, 2012),[4] and since Treasury appears to have responded to many of the RPTE Comments, we thought that we would share our thoughts and insights on the Final Regulations by specifically addressing some of the remaining nuances and newly created issues.

As an homage to David Letterman, this commentary will detail the "Top 10" things that you ought to know about the Final Regulations! Not every issue

addressed in the Final Regulations is discussed in our commentary, for if we did that, this newsletter would be your new "go-to" insomnia literature[5] and we would be depriving you of the joy of reading that new portability best seller "TD 9725" (well it's actually free, but you get the point). Instead, our goal is to focus on the highlights that we think may be most relevant to estate planning practitioners… like you!

COMMENT:

Overview - Temporary, Proposed and Final Regulations

The Final Regulations, issued on June 12, 2015 (TD 9725), finalized the Temporary Regulations (TD 9593, IRB 2012-28).[6]

In addition to providing a brief history of the federal estate tax portability statute (i.e., § 2010[7]) and the Temporary Regulations, the preamble to the Final Regulations (the "Preamble") responds to comments made to Treasury after such regulations were issued. In the Preamble, Treasury appears to be responding to many of the RPTE Comments.

As we detail below, as to the Temporary Regulations, the Final Regulations, (1) change a few things, (2) keep other things *status quo*, and (3) signal that, while a particular change was not made in the Final Regulations; such a change *may* nevertheless be forthcoming. In addition, there are some provisions where we have to throw up our hands and state, "well, unlike Jordan Spieth, you can't win-them-all."

We now present our "Top 10 Highlights of the Final Portability Regulations."

10. Taxpayer Friendly (think "Toto")

Upon their issuance, we always viewed the Temporary Regulations were as very "taxpayer-friendly" in their approach and guidance; we continue to take this position with regard to the Final Regulations.

Before the issuance of the Temporary Regulations, it was learned through informal conversations that Treasury's goal was to avoid any "gotcha" provisions that were prevalent within the Code's portability provisions. It appeared to us then, as it does now, that Treasury views portability as a "pro-taxpayer" provision. With this in mind, it appears that Treasury sought to

create rules consistent with that view. In subsequent informal conversations with the Internal Revenue Service (the "Service"), we believe that still is their intended position.

Since the issuance of the Temporary Regulations, there have been some private letter rulings that have been issued regarding the portability election (specifically late elections).[8] In reading those rulings, it is clearly apparent that the Service will broadly interpret the portability provisions in order to allow taxpayers to effect a late portability election. One of authors is aware of two situations where the Service allowed the taxpayer's representatives to withdraw a ruling request because the Service could not, as a matter of law, issue a favorable ruling.

In promulgating the Temporary Regulations, Treasury had opportunities to interpret the law unfavorably to the taxpayer. For example, before the Temporary Regulations were issued, we questioned the ordering rules with regard to the use of the deceased spousal unused exclusion amount (the "DSUE amount"). When a gift is made, it was completely unclear as to whether the DSUE amount would be used first, whether the surviving spouse's basic exclusion amount ("BEA") would be used first, or whether the surviving spouse's BEA would be applied pro rata with the DSUE amount. In the Temporary Regulations, Treasury determined that the DSUE amount is used first, which is most favorable for the taxpayer.

Another example of statutory confusion involved the so-called "portability clawback" (yikes, "clawback" is a word that we have not heard since 2010!). Prior to the issuance of the Temporary Regulations, a close reading of the portability statutes seemingly could have led to a disastrous result for a particular taxpayer under the following sequence of events: (1) the surviving spouse made a taxable gift and applied the ported DSUE amount against the value of such gift, (2) the surviving spouse married a second spouse, and (3) the second spouse died and left the surviving spouse with no DSUE amount. Reading §§ 2010 and 2505, one could have interpreted that, because only the DSUE amount of the most recent deceased spouse was utilized upon the occurrence of a taxable transfer by the surviving spouse (i.e., inter vivos or upon death), the first spouse's DSUE amount could have been "clawed back" upon such taxable transfer which could have led to significant transfer taxes being imposed on the surviving spouse (or his/her estate). Treasury dispensed with that possibility by introducing the "special rule in case of multiple deceased spouses and previously-applied DSUE amounts" under Temp. Reg. §

20.2010-3T(b) of the Temporary Regulations (now Treas. Reg. § 20.2010-3(b)).

What then is the take away? Both Treasury and the Service appear to view portability as a taxpayer-friendly provision and as such they appear to interpret issues in favor of the taxpayer, at least with respect to this provision. Thus, Treasury's approach in the Final Regulations was to keep their approach to portability *status quo* (which is a good thing)!

9. Don't Throw the Temporary Regulations Away Yet! You'll Need Them!

The Final Regulations apply to estates of decedents dying after June 12, 2015 (i.e., their issuance date). They also specifically state that the Temporary Regulations apply to estates of decedents dying "on or after January 1, 2011 and before June 12, 2015." *See* Treas. Reg. §§ 20.2010-1(e), -2(e), and -3(f). The same rules also apply for taxable gifts. *See* Treas. Reg. §§ 25.2505-1(e) and -2(g).

So, when we look at what Treasury did, we can sum it up as follows: (a) they have changed the rules that would apply for decedents dying after June 12, 2015; and (b) kept it *status quo* for decedents that died before that day (but after December 31, 2010).

8. Anticipated Further Relief for Late Elections for Smaller Estates

Both the Temporary Regulations and the Final Regulations effectively divide estates into two groups: "smaller estates" and "larger estates."[9] You may wonder why there is a need to differentiate between the two types of estates. Among other things, it sets the stage to determine whether the time for filing the election is "regulatory" or "statutory," which is a very important distinction under the § 301.9100 Treasury Regulations.

So, what is a "smaller estate"? It is an estate where the gross estate (combined with the decedent's adjusted taxable gifts) is less than the BEA for the year of the decedent's death. Thus, for decedents dying in 2015, if the gross estate plus adjusted taxable gifts is less than $5.43 million, the estate is a "smaller estate."

Although it has been reported that only 0.2% of the population will be subject to an estate tax liability, it does not mean that only 0.2% of estates will be

required to file a federal estate tax return (a "706").[10] To the contrary, with the unlimited marital deduction and portability, we believe that it is likely that more 706s than anticipated may be required to be filed.[11] However, there is a growing belief by the public (and perhaps by the uninformed) that the combination of the increased BEA and portability translates to a diminished need (or no need) for estate planning and/or administration for smaller estates.[12] This may be the reason for the unfounded, growing belief that there is no need for smaller estates to file 706. By failing to file a 706, especially when the combined assets of both spouses exceeds one BEA but is less than the combined BEA's, both estate planners and the Service are aware that those smaller estates failing to file a 706 will miss the benefits of portability. We surmise that missed elections will continue and would likely be as a result of: (a) inadequate advice, (b) no advice, or (c) not understanding how the portability election works. So that's *the bad news*!

So, what's the *good news* related to late elections for smaller estates? The *good news* is that the Final Regulations provide that smaller estates can apply for relief under Treas. Reg. § 301.9100-3 with respect to late elections ("9100-3 Relief").[13]

However, the *not-so-good news* (for the client) is that in order to obtain 9100-3 Relief, the taxpayer is required to file a private letter ruling ("PLR") request. As all tax practitioners are aware, there are two major impediments to most PLR requests: (a) the relief is at the Service's discretion, and (2) the cost is often prohibitive (i.e., in addition to the $10,000 filing fee, there is the tax professional's preparation fee for drafting and filing the PLR).

Last year, at the request of a number of organizations, including RPTE, the Service issued Revenue Procedure 2014-18,[14] which allowed smaller estates that failed to make a valid portability election a simplified method to obtain relief. Rev. Proc. 2014-18 was viewed as being extremely taxpayer-friendly because it eliminated the two shortcomings of the PLR approach for 9100-3 Relief: (a) relief was automatic, and (b) did not require a filing fee or a fee for preparation of a PLR.[15] *That was the good news … last year!*

However, the *not-so-good news* was that timing for the relief given by Rev. Proc. 2014-18 was limited. Rev. Proc. 2014-18 only applied if four requirements were met: (a) the U.S. citizen or resident decedent died in 2011 through 2013, (b) the election was not made on a timely-filed return, (c) relief was sought on or before December 31, 2014, and (d) the executor adhered to

certain guidelines set forth in the revenue procedure. Thus, in 2015 and beyond, the benefits of Rev. Proc. 2014-18 are no longer available!

The RPTE Comments, written before the issuance of Rev. Proc. 2014-18, sought to effectively incorporate the benefits eventually granted in the revenue procedure into the Final Regulations. *More not-so-good news* … unfortunately, the Final Regulations do not incorporate such relief.

However, the *not-so-bad news* is that the Final Regulations included a provision that states that 9100-3 Relief "may be available" for smaller estates. Further, in the Preamble, Treasury seems to say that they will consider future relief similar to what was provided for in Rev. Proc. 2014-18, which would grant the automatic 9100-3 Relief without the cost or expense of a PLR.

We look forward to future relief! At the current time, a project is underway within RTPE on this specific issue to submit new comments to Treasury to consider how to protect the government's interests (their concern), while providing relief to taxpayers (our goal).

This provision will fall under the category of "the IRS may change a couple of other things, but they did not make the changes in the Final Regulations."

7. No Clarification in the Event that the Executor is Unsure of the DSUE Amount

From time to time, an executor may not be able to definitively determine whether an asset may be included in an estate or whether a contingent liability is deductible; thus, calculating the DSUE amount would be difficult, if not impossible.

The RPTE Comments asked for guidance on whether a procedure could be adopted akin to a "protective" election to allow the DSUE amount to be recalculated based on subsequent events affecting the deceased spouse's 706. The Final Regulations provide that it is sufficient if the 706 is properly prepared in a manner that would advise the Service of the uncertainty. *See* Treas. Reg. §§ 20.2010-2(a)(7) and -2(b). Treasury gave one example in the preamble involving a 706 where, (a) DSUE amount was listed as zero, (b) no "portability opt-out" was elected, and (c) a protective claim for refund was reported based on a claim against the estate, and, subsequently, with a payment made in satisfaction of the claim, a DSUE amount was generated. Based on

this example, Treasury implied that the Final Regulations automatically recalculate the DSUE amount so that, under this example, no "protective DSUE amount election" was necessary. We had hoped that Treasury would have seen fit to address this issue in more detail, but they did not.

This provision would fall under the category that Treasury keep *status quo* (and the "you-can't-win-them-all" category).

Planning Pointer – If you encounter this situation, consider adding a statement to the deceased spouse's 706 stating the issue and that, in light of Treas. Reg. § 20.2010-2(b), the portability election is made as to any recalculated DSUE amount.

6. Surviving Spouse's Ability to Make the Election - Who is the Executor

The RPTE Comments (and others) expressed a concern that there may be times where it was unclear who would be able to file the 706 and make the portability election. Thus, it was suggested that the surviving spouse should have a priority preference to make the election in order to avoid the great loss that could occur if the election was not timely.

For instance, assume that a prenuptial agreement provides that the election should be made upon the death of the first spouse to die. Further assume when the first spouse dies, he or she does not name the survivor as the executor. The non-spouse executor, notwithstanding the prenuptial agreement, decides not to make an election. Even though the surviving spouse has a claim against the estate to enforce the prenuptial agreement, the clock is continuing to click and the 706 filing date comes and goes and portability is not elected.[16] By further example, there may be a circumstance where there is no prenuptial agreement and the will is silent. In this case, where there is a debate between the surviving spouse (who wants the election) and the executor (who may not the election), it would have been a good idea for the Treasury to take a stance and provide the surviving spouse with some rights, since he/she bears the burden when the election is either not made or is untimely.[17]

The concern was that the benefits of the election would be lost (perhaps with smaller estates there may be 9100-3 Relief, but with larger estates, there could be no relief – at least under current law). It appears that Treasury did not see the exigencies of this issue so they opted not to make any changes.

This falls in the *status quo* and "you-can't-win-them-all" categories.

This is a Real Problem – Not a Hypothetical: One of the authors has personal knowledge of a situation involving a similar scenario where the issue was ultimately settled out of court … which is probably the usual result. We are sure that it was not an inexpensive endeavor.

Unanswered Questions – For a Later Day: This issue raises the question as to whether a duty exists for the executor to make the election. We believe that the determination ultimately turns on whether the spouse is a beneficiary under the estate plan and whether the estate plan is affected by the portability election (i.e., for example, does QTIP property pass to different beneficiaries than non-QTIP property). A more interesting question is whether Congress has created some bundle of rights in all surviving spouses (except perhaps those who have waived their spousal rights) when portability was enacted. Could one argue that now, with portability, all spouses are beneficiaries of the probate estate? We anticipate that there will be more to come on this issue. We look forward to our peers who are challenged with this and wish to raise this issue with the state bar associations!

5. No Clarification of Special Valuation Rule – But Allows for Future Clarification

For smaller estates, the special valuation rules under Temp. Reg. § 20.2010-2T(a)(7)(ii)(A) was inserted into the regulations with the goal of minimizing the reporting of the value of assets in certain situations (i.e., the executor could give a rough estimate of assets, instead of having the assets valued at date of death). The RPTE Comments requested clarification under this provision. They provided a number of hypothetical situations where clarification would be most helpful.

Treasury opted not to add any such clarification in the Final Regulations. However, we suspect there may have been merit in the comments because preamble to the Final Regulations state that "Final Regulations provide flexibility to refine the rules in subregulatory guidance at any time." *See the penultimate sentence in* Treas. Reg. § 20.2010-2(a)(7)(ii)(A).

On a related issue, in the same valuation provision, there was concern that the language was overly broad and that it could potentially affect the tax basis of property and the Service's reach to evaluate such basis. Treasury agreed that

the language was overly broad on that issue and modified the Final Regulations. *See* Treas. Reg. § 20.2010-2(a)(7)(ii)(A)(2).

4. No Form 706-EZ

Some practitioners asked for a simplified version of the 706 (i.e., a "Form 706-EZ") if the only reason for filing a 706 was for the portability election. Treasury had concerns that creating, administering and filing a separate return were unduly burdensome and on balance it is better to only have one operative 706 form for residents and citizens. We view this as a reasonable response by Treasury.[18]

This falls in the category of *status quo*, and on balance we view it as acceptable. With today's software programs to prepare 706's, especially as to smaller estates, the preparation should be relatively easy.

3. More Clarification on the QDOT Rules and NRAs

The Temporary Regulations had many provisions regarding portability and the use of QDOT's. Some commenters felt that clarification of the QDOT rules and examples was warranted. Treasury agreed and has modified the rules. The changes are generally taxpayer-favorable.

One of the clarifications concerned the situation where a non-citizen surviving spouse becomes a U.S. citizen and, if the requirements under § 2056A(b)(12) are satisfied, no additional estate tax is imposed under § 2056A and the DSUE amount would not have to be adjusted for future distributions. Although we thought that this would have been the result, it was not clear under the Temporary Regulations. *See* Treas. Reg. §§ 20.2010-2(c)(4)(ii) and -2(c)(5)(Example 4); Treas. Reg. § 20.2010-3(c)(3)(iii); and Treas. Reg. §§ 25.2505-2(d)(2) and -2(d)(3).

The Final Regulations also clarify that if the surviving spouse becomes a U.S. citizen (meeting the requirements under the QDOT provisions), the available DSUE amount will be automatically ported to the surviving spouse. *See* Treas. Reg. § 20.2010-3(c)(2) and Treas. Reg. § 25.2505-2(d)(3)(ii).

These changes fit into the "Treasury made some good changes" category.

2. Examination Issues on the Survivor's Death

The RPTE Comments raised five procedural and administrative issues that may arise upon the surviving spouse's death. The Final Regulations did not address any of those issues.

This falls into the status quo, and "you-can't-win-them-all" categories.

And NOW (with apologies to Anton Figg…major drum roll) … for our Number 1 "Highlight of the Final Portability Regulations":

1. Future Guidance with Regard to the Rev. Proc. 2001-38 Issue

Perhaps the most notable omission from the Final Regulations, and the one issue that will have a greater impact on portability planning, is Treasury's inability to resolve the issue presented as a result of Rev. Proc. 2001-38.[19] The conclusion of that revenue procedure is if a testamentary QTIP election is made, and the making of such election was "unnecessary" to reduce the estate tax payable to zero, the QTIP election would be void *ab initio*.

In a letter to Treasury in dated June 11, 2013, written by the RPTE,[20] it was opined that:

> Rev. Proc. 2001-38 is a remedial procedure intended to permit surviving spouses to avoid the loss of the benefit of the applicable exclusion amounts ["AEA"] of their predeceased spouses. However, with the advent of portability, the unused applicable exclusion amount of the spouse who dies first is not lost if an applicable QTIP election is made as long as the portability election also is made. Therefore, Rev. Proc. 2001-38 should be modified to clarify that nullification of an applicable QTIP election is not available when the portability election is made.

Not all practitioners argue that Rev. Proc. 2001-38 impacts portability and QTIP trust planning.[21] However, Treasury has acknowledged that this is a valid issue by including it within its annual Priority Guidance for the past two years.[22] Despite this acknowledgment, Treasury elected not to address it in the Final Regulations. However, in the Preamble, they have given us hope. The preamble provides that Treasury "intends to provide guidance, by publication in the Internal Revenue Bulletin, to clarify" the issues presented under Rev. Proc. 2001-38. We hope that they will amend Rev. Proc. 2001-38 to take into consideration the issues raised by RPTE.

Another reason for the failure to resolve this issue may simply have been one

of timing. Recall that the Temporary Regulations were promulgated on July 12, 2012, and by their terms were only valid for three years (i.e., until July 15, 2015). We surmise that even though Treasury has been aware of this issue, considering the volume of other issues that it may consider more pressing (for example, issuance of Regulations under § 2704 and under § 2801), the priority for issuance of such guidance is low. The reference in the preamble is a positive signal that the issue will be resolved, but just not at the present.

One suggestion is that Rev. Proc. 2001-38 could be modified to provide a limited exception for QTIP elections where portability has been elected. This way, Rev. Proc. 2001-38 is maintained for those estates where portability is not elected. It would be a relatively simple fix which would not require any changes to the 706 and only a minor change to the revenue procedure.

A few brief words about Rev. Proc. 2001-38 are important to note. By its terms, Section 3 of the revenue procedure, titled "Scope," states that it only applies in the estate tax context (i.e., it does not apply if there are *inter vivos* gifts made to a QTIP trust). Further, it only applies if the QTIP election was not necessary to reduce the estate tax liability to zero. What this means is that its applicability is limited to smaller estates and estates where the taxable estate is less that the decedent's unused AEA (i.e., where it is "unnecessary" to make the QTIP election solely to reduce estate taxes to zero). This is an important distinction, since some believe that Rev. Proc. 2001-38 applies to all estates where a QTIP election is being made; this is not the case.

The language in the preamble falls into the category of Treasury "signaling that the IRS may change things." We hope so!

Conclusion:

The taxpayer-friendly Final Regulations provided us with some changes, some things that stayed the same and some hope that other things may change. We applaud Treasury's efforts on finalizing the portability regulations, and look forward to future clarification on those outstanding issues mentioned herein.

Perhaps it is now a good time to follow that yellow-brick regulatory road and read the Final Regulations!

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE*

DIFFERENCE!

Lester B. Law

George D. Karibjanian

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CITATIONS:

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[1] Abbot Downing, a Wells Fargo business, provides products and services through Wells Fargo Bank, N.A. and its various affiliates and subsidiaries.

[2] Music and Lyrics by Stephen Schwartz; Book by Winnie Holzman; produced by Universal Studios in coalition with Marc Platt and David Stone.

[3] Schiller, "Estate Planning At the Movies®: Jeremiah Johnson Marks the Final Portability Regulations," Estate Planning Newsletter #2316 (June 22, 2015).

[4] A copy of the RPTE Comments can be found at this link: RPTE Comments

[5] Thereby displacing some of the same-sex marriage articles written by one of the authors.

[6] Although the Temporary Regulations and proposed regulations (FR Doc: 2012-14775) were issued contemporaneously and were identical, for ease of writing, references to both shall be contained in the use of "Temporary Regulations" and citations to those regulations will be simply to the Temporary Regulations (e.g., Temp. Reg. § 20.2010-2T(a)).

[7] Unless otherwise specifically stated, all section references shall be to the Internal Revenue Code of 1986, as amended (the "Code"), and include references to the Treasury Regulations thereunder.

[8] See, e.g., PLRs 201421002, 201418023, 201418014, 201418009, 201414001, 201410013, 2014007002 and 201406004 where the IRS granted late-filing relief.

[9] Technically, the regulations don't divide estates into "smaller" and "larger" estates. Rather, they have rules that apply to estate that would not have to file an estate return, other than to make the portability election – that is, "smaller estates" (e.g., see, Treas. Reg. §§ 20.2010-2(a)(1) and -2(a)(7)). They also have rules for all estates. So, we call those estates that don't have to file a 706 other than to make the portability election, "smaller estates," and all other estates, "larger estates." When it applies to relief for a late election, smaller estates are treated one way, and larger estates are treated differently. So, indulge us by allowing some flexibility in defining the estates as "smaller" and "larger."

[10] Joint Committee on Taxation, *History, Present Law, and Analysis of the Federal Wealth Transfer Tax System* (JCX-52-015), March 16, 2015, p1.

[11] Additionally, since many states with an estate or inheritance tax require the information from a 706, it may be the case that 706's will have to be filed just to satisfy the state requirements.

[12] Planners understand that this is silly, because estate planning is not merely driven by tax.

[13] *See* Treas. Reg. § 20.2010-2(a)(1) – the last sentence. It should be noted that there is no relief for "larger estates," because 9100-3 Relief is only available where the time for making the election is set by the *regulations*, and not by *statutes*. For larger estates, the statute sets the time for filing the election … unfortunately. That's just the way the statutes are written. An

effort has been made to ask Congress to change this rule so that there is no differentiation between smaller and larger estates. See, letter to ranking members of the Senate Finance Committee and House Ways and Means Committee dated April 25, 2013, where, among other things, the RPTE asked to change the statute so that 9100-3 Relief would be available to all estates. A similar suggestion is being formulated by the Estate and Gift Tax Committee of the ABA Tax Section. A copy of RPTE's letter can be obtained at this link: RPTE Letter

[14] Rev. Proc. 2014-18, 2014-7 I.R.B. 513 (January 27, 2014).

[15] For more details about Rev. Proc. 2014-18 and the efforts on how this came about, and to see why relief is not available for "larger estates" (i.e., those estate that are not "smaller estates"), *see*, Franklin and Law, *IRS Provides Relief for Certain Missed Portability Elections – If Corrective Action is Taken*, ABA-RPTE- eCLE, a copy can be obtained at this link: Franklin and Law. See also, letter to IRS dated September 27, 2013 from RPTE asking for guidance on relief under both Treasury Regulations §§ 301.9100-2 and -3, a copy of which can be obtained at this link: RPTE Letter

[16] This example assumes that an administrator-ad-litem was not appointed to make the requisite portability election. Query, though, whether the surviving spouse would have a claim against the executor for the lost DSUE amount and ponder how a judgment in favor of the surviving spouse would be implemented – DSUE amount is an "intangible" asset, so would the surviving spouse receive physical assets? If so, would they have to be "grossed" up in order to account for the additional projected estate taxes that would be imposed on such assets at the surviving spouse's death?

[17] For a more comprehensive discussion of the issue, see the RPTE Comments.

[18] It is interesting to note in Treas. Reg. § 20.2010-2(a)(7)(ii)(B), the Final Regulations eliminated the $250,000 threshold, and instead stated that that threshold would be now be provided in the "Instructions for Form 706." We view this as a sensible approach, this way, going forward the Service could change the threshold by merely changing the instructions.

[19] Rev. Proc. 2001-38, 2001-1 C.B. 1335 (June 11, 2001).

[20] See, letter to the Service dated June 11, 2013, which contained the RPTE comments on Rev. Proc. 2001-38 in the Context of Portability Planning, a copy of which can be obtained at this link: RPTE Comment Letter

[21] For a contrary view, *see* Bramwell, Dillon & Mullen, *"Relax, Rev. Proc. 2001-38 Cannot Be Used Against Taxpayers, Or Why QTIP Planning is Safer than Some Might Think*," Estate Planning Newsletter #2100 (May 20, 2013).

[22] Office of Tax Policy and Internal Revenue Service, 2013-2014 Priority Guidance Plan, Released August 9, 2013, p.15, and Office of Tax Policy and Internal Revenue Service, 2014-2015 Priority Guidance Plan, Released August 26, 2014, p.16.